No. 82-2042

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN and MARION GEE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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On Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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Statement of the Case

This case is before this Court for the second time on a petition for writ of certiorari by the defendant Westinghouse from the second opinion rendered in this case by the United States Court of Appeal for the

Eighth Circuit. This case raises now familiar questions regarding the burdens of proof and of producing evidence in a lawsuit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, and whether the District Court's opinion, twice upheld by the Court of Appeals, may be considered to be clearly erroneous.

Reviewing the record and the District Court reasoning, the Court of Appeals found that the lower court's consideration of the record as a whole was sufficient along with its detailed factual findings, to support its conclusion that Vaughn was unlawfuly disqualified from her job as a sealex operator. Specifically, the Court of Appeals held, "We cannot say after a review of the record, that we are left with a definite conviction that a mistake was committed in the district court's findings of fact."[1/]

1/ Vaughn v. Westinghouse Electric Corp., 702 F.2d 137, (8th Cir. 1983). See also United States v. United Staets Gypsum Co., 333 U.S. 364, 395 (1948).

Summary of Argument

The petition for a writ of certiorari should be denied for four reasons: (1) The petitioner has distorted the record and misconstrued the holdings of the courts below in a manner which obscures the issues and the findings in this case; (2) The decision of the District Court was not clearly erroneous; (3) The Eighth Circuit's holding and the reasoning of the District Court are consistent with the decisions of this Court; and (4) The holdings of the Eighth Circuit are fully consistent with the decisions of the other circuits.

ARGUMENT

Reasons For Denying The Writ

I. THE PETITION FOR CERTIORARI DISTORTS THE RECORD AND MISCONSTRUES THE HOLDINGS OF THE COURTS BELOW.

Because this case was fully tried on

the merits the defendant's attempts to frame the issues in terms of the making and refuting of a prima facie case and the establishment of pretext is singularly inappropriate.[2/] The predominant holding of the District Court and the Court of Appeals is simply that the trial court may consider the record as a whole in determing whether, in a lawsuit tried pursuant to Title VII,[3/] the proffered reason for the employer's action was pretextual, and that here, there was no basis for holding that the District Court's judgment was clearly erroneous.

The District Court offered the following view of its obligation to review and weigh the evidence before it:

2/ United States Postal Service Board of Governors v. Aikens, ___ U.S. ___, 75 L.Ed.2d 403, 409 (1983).

3/ 42 U.S.C. § 2000e et seq.

> The Court believes itself obliged, however, to consider the whole record, including those portions of the evidence that may throw indirect light on defendant's conduct. The Court is not called upon to express a generalized judgment about Westinghouse's employment policies. This is only an individual action challenging a single employee's disqualification and transfer to a lesser-paying job. But circumstantial evidence of intent, as well as direct, is relevant and can be persuasive. Direct evidence of discrimination is rare. An individual personnel action can usually be properly judged only if it is placed in the broader context of defendant's actions over a substantial period of time.

Vaughn v. Westinghouse Electric Corporation, 523 F. Supp. 368, 370 (E.D. Ark. 1982) (Pet. App. B-4)[4/]

This Court's recent holding in United States Postal Service Board of Governors v. Aikens, ___ U.S. ___, 75 L.Ed.2d 403, n.3 offers unequivocal support for this view.

4/ Citations in this form refer to the appendix to the petition.

> As in any lawsuit the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to summit direct evidence of discriminatory intent. See International Brotherhood of Teamsters v. United States, 431 U.S. 324 n.44 ... (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination").

That plain statement, that Title VII does not require direct proof of discrimination, in itself answers the primary legal argument pressed by the defendants.[5/]

However, ignoring the full and acccurate statement of the facts by two courts in four opinions below, see 620 F.2d 655, 656-657 (8th Cir. 1980); 702 F.2d 137, 139 (8th Cir. 1983) (Pet. App. A 2-4) 471 F. Supp. 281,

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5/ Ironically, while the defendant cites Aikens at least twice in his brief, nowhere does he discuss the specific resolution Aikens offers to the complaints they raise.

283-290 (E.D. Ark. 1979); 523 F. Supp. 368, 371 (E.D. Ark. 1982) (Pet. App. B 4-6), the petitioner again seriously distorts the record and has misconstrued the holdings of those courts in its quest for new factual findings in this Court. This effort fails to recognize that this Court simply does not sit to resolve disputed issues of fact.

The defendant argues that their employment statistics were only marginally bad (i.e. "less-than-perfect") concerning black representation in the workforce (Pet. 6);[6/] that plaintiffs failed to offer any evidence relating to the challenged employment decision (Pet. 6); that defendant's allegations regarding the reasons for the discharge of plaintiff Vaughn were unrebutted (Pet. 8); and that plaintiffs' only evidence was statistical

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6/ Citations in this form refer to the Petition.

and/or general (Pet. 10). None of these assertions withstand even a casual review of the record.

Following the initial trial, the District Court carefully considered the evidence before it and made extensive findings regarding the defendant's policy and practices with respect to minority employment. There the Court found that at the time Title VII became effective in 1965, virtually no blacks were employed by the defendant; there was only one black white-collar employee, a secretary; no blacks in supervisory positions; and only one black hired as a production employee. Vaughn v. Westinghouse Electrict Corp., 471 F. Supp. at 284.

The Court goes on to find that post-Act change in this situation was slow, indicating that out of 22 office and clerical employees only 3 were black and none of them were in

supervisory positions; that no blacks had ever been employed as supervisors in the defendant's office force at the plant involved in this case; that of 25 or 26 supervisors, including manufacturing supervisors who hold entry level management jobs, only 2 were black. Id. at 284. The Court's opinion continues to make additional findings regarding the discriminatory effect of defendant's practices by noting their failure to post vacancies for supervisory positions; the discriminatory effect of its hiring practices which keeps blacks confined to lower paying jobs; and the racial stratification of its workforce, particularly noting the lack of blacks hired into maintenance jobs and the high rate of discharges among blacks. Id. at 285.[7/]

7/ Of 65 persons discharged between 1972 and 1978, 39 or 60% were black, "a figure far above the overall proportion of black employees, which is now at a high of about 24 or 25%." 471 F. Supp. at 285.

Similarly telling was the Court's finding that given the high number of blacks applying for jobs at Westinghouse; the disproportionately low numbers of blacks obtaining positions; and the inability of the defendant's personnel manager to explain these figures; "[T]he inference is very strong indeed that the number of black people hired is being artifically depressed." Id. at 284. Accord, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

In the context of this type of statistical data the Court succinctly expressed its view with respect to the fact that no specific qualifications had been set out by the employer for either production-line jobs or supervisory jobs.

> Subjective criteria for employment are not illegal in themselves but the

> fact that an employer has continued to use them, with the danger of disparate treatment that they entail, is a factor to be considered.
>
> 471 F. Supp. at 285.[8/]

The defendant's petition again implies that the Court[s] below required the defendant to establish "objective standards" for disqualification of employees as a prerequisite to its ability to prevail on the ultimate question. However, neither of the Courts below ever imposed such a requirement. In fact the District Court specifically rejected such a course, see 471 F. Supp. at 291, and the Court of Appeals made no mention of such a standard. Rather, both Courts found that in

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8/ Compare Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972) cert. denied 409 U.S. 862 (1972) "[t]he lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's workforce."

light of the statistical and documentary evidence, the conflicting nature of testimony offered at trial, and the defendant's disputed statements regarding plaintiffs' poor production, that the plantiffs had meet their burden on "the ultimate question of discrimination vel non." United States Postal Service Board of Governors v. Aikens, 75 L.Ed.2d at 409.

Moreover, the Court found that plaintiffs testimonial evidence was persuasive in giving life to their statistical evidence. Specifically, the Court found the testimony of Ms. Wilma Donley, a former employee and union shop steward to be particularly enlightening regarding the harassment of black employees by the largely white foremen and supervisory staff. While noting that much of Ms. Donley's wide-ranging testimony was contradicted by company witnesses, the Court specifically credited her testimony. Vaughn v. Westinghouse

Electric Corp., 471 F. Supp. at 286. Similarly, such factual questions regarding whether or not the defendant's supervisor actually advised plaitniff of her so-called deficiencies was also disputed. Vaughn, 702 F.2d at 139.

On remand, the Court added to its detailed summary of the evidence, finding that:

> [A]lmost all of the defendant's supervisors, including the two men under whom plaintiff worked as a sealex operator are and have been white; that most labor-grade-four sealex operators in 1971, when plaintiff was disqualified were white (Tr. 15); that 'basically all' the labor-grade-one bulb loaders (the lower-paying job to which plaintiff was demoted) were black (Tr. 17); that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O. D. Brazil, before her transfer to Mr. Turnage's shift; and that plaintiff had progressively been given pay increases, until, several months before her disqualification, she had reached the top of pay available for that work.

Vaughn v. Westinghouse Electric Corp., 523 F. Supp. at 371 (Pet. App. B 5).

The defendant, erroneously characterizing these and other findings as "generalized evidence" now pleads for a rule inapplicable to the facts of this case, that would strictly limit the interpretation given to various types of evidence and unduly hinder the lower courts from giving full consideration to all the evidence before it.[9/]

Such a procedure plainly violates the clear holding of cases such as Aikens, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Teamsters, 431 U.S. 324 (1977), and ignores the prescriptions of such cases as Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), which indicated that the presumptions, articulations and shifting of burdens are primarily concerned with insuring that the issues are drawn and the evidence presented in a managable way to the trier of fact.

9/ Compare Aikens, ___ U.S. ___, 75 L.Ed.2d at 411.

II. THE HODLING OF THE COURT OF APPEALS AND THE REASONING OF THE DISTRICT COURT ARE CONSISTENT WITH THE DECISIONS OF THIS COURT AND ARE NOT CLEARLY ERRONEOUS.

The trial court gave careful consideration to the facts presented in this case. It has on three occassions addressed itself to the applicable law. The care with which the Court addressed these facts and issues is additionally made clear by the distinctions it drew between the experiences of the various original plaintiffs and the manner in which it evaluated the claims of plaintiff Vaughn.[10/] This careful consideration of the record is fully consistent with the Supreme Court's holdings in Aikens, 75 L.Ed.2d at 411; Burdine,

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10/ The District Court found against plaintiff Vaughn on four other claims of racial discrimination, 471 F. Supp. 281, 289, and similarly denied the claims of original plaintiffs Crutcher and Gee, 471 F. Supp. 286-288.

450 U.S. at 254; and McDonnell Douglas, 411 U.S. at 804. As this Court held in Aikens, 75 L.Ed.2d at 410:

> The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, supra, at 577, 57 L.Ed.2d 957, 98 S.Ct. 2943.

In the case at bar the District Court and the Court of Appeals sensitively applied the principles articulated in the holdings of this Court and determined on the basis of "all the evidence" that "the defendant intentionally discriminated against the plaintiff. Aikens, 75 L.Ed.2d at 409, 410. See also Burdine, 450 U.S. at 253.

The initial Court of Appeals decision in this case, 620 F.2d at 660, cited the opinion of the Third Circuit in Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3rd Cir. 1979) for two propositions still relevant to this cause.

> [T]here are no hard and fast rules as to what evidence must be considered as constituting a prima facie case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the factfinder that there has been illegal discrimination resides always with the plaintiff. We will thus review the judgment of the district court not with an eye to strict adherence to form but in order to determine whether the decision on the merits of plaintiff's case is clearly erroneous on the facts, or uncongenial to previously enunciated legal standards.

In the case at bar, the trial court carefully considered the record as a whole and determined that the plaintiff had established her case by a preponderance of the evidence. The trial court's factual findings reviewed and upheld by the Court of Appeals twice, make plain that notwithstanding the defendant's articulation of facially valid reasons for its disputed conduct, weighed against the record as a whole, there was sufficient basis for the Court's holding that the plaintiff was disqualified in violation of Title VII, and

that a review of the record did not leave a definite conviction that a mistake was committed in the District Court's findings of fact. Vaughn, 702 F.2d at 137 (Pet. A 4) citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See also, Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982).

III. THE HOLDINGS OF THE EIGHTH CIRCUIT ARE CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Courts of Appeals have generally understood that McDonnell Douglas provides an analytical framwork for evaluating claims of employment discrimination and they have been sensible and flexible in their application of its standards.[11/] Similarly, the lower courts have correctly concluded that

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11/ Notwithstanding the broad range of the types of discrimination charged and the methods of proof available, the Courts of Appeals have had no difficulty ordering

McDonnell Douglas standards were not altered by Burdine, supra, see, e.g., Harrell v. Northern Electric Co., 672 F.2d 444, 448 (5th Cir. 1982). Now, with this Court's recent opinion in Aikens, there is little or no need for further exposition on the balancing of burdens or other legal rituals. Rather, once the parties have made their presentations, and the defendant has done all that would be required of him assuming that the plaintiff has made out a prima facie case:

11/ continued

their evaluation of the cases pursuant to the demands of McDonnell Douglas. King v. New Hampshire Dep't of Resources, 562 F.2d 80, 83 (1st Cir. 1977); Loeb v. Textron Inc., 600 F.2d 1003, 1013-1019 (1st Cir. 1979); Wright v. National Archives Records Service, 609 F.2d 702 (4th Cir. 1979); Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977); Peters v. Jefferson Chemical Co., 516 F.2d 447, 449-450 (5th Cir. 1975); Davis v. Weidner, 596 F.2d 726, 729-30 (7th Cir. 1979); Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980).

> The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiffs. Burdine, supra at 253, 67 L.Ed.2d 207, 101 S.Ct. 1089.

Aikens, ___ U.S. ___, 75 L.Ed.2d at 410.

Nothing more clearly illustrates this general lack of confusion than the cases cited by petitioner[12/] in its efforts to convince this Court that confusion reigns below. These cases each share with Aikens and the Eighth Circuit's decision in Vaughn, an evaluation of the record as a whole and review analysis guided by the clearly erroneous rule.

In commenting upon Grano v. Department of Development, 699 F.2d 836 (6th Cir. 1983) the petitioner asserts that is was only the lack of objective standards which swayed the Court in Vaughn. This is plainly not the case -- though as similarly pointed out in Grano the subjectivity of the evaluation process was a factor to be considered.

12/ Pet. 11-12.

Grano was plainly a case in which the District Court relied on a review of the "record as a whole" and on this basis ruled for the defendant notwithstanding the subjective nature of the evaluation process.

> In the instant case the district court engaged in the probing analysis of Huddle's evaluation process and concluded that the ultimate decision was not based on plaintiff's sex.

Grano, 699 F.2d at 838.

Similarly, the defendant grossly misstates the holding of Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983). There, the Tenth Circuit specifically cited McDonnell Douglas, 411 U.S. at 804 for the proposition that, "the employers 'general policy and practice with respect to minority employment' particularly statistics reflecting a general pattern and practice of discrimination," constitutes relevant evidence for a showing of pretext. Thus while the Court in Mohammed v. Callaway, certainly considered evidence of direct com-

parisons between the rejected plaintiff and the non-minority successful applicant, it is also clear that indirect or circumstantial evidence was also important to its ultimate conclusion. Mohammed, 698 F.2d at 401.

Significantly, the Court in Mohammed applied the clearly erroneous rule as interpreted in United States Gypsum Co., 333 U.S. at 395 and held:

> In sum, the record as a whole does not support the district court's finding that both candidates were amply qualified.

Mohammed, 698 F.2d at 401.

In Montgomery v. Yellow Freight Systems, 671 F.2d 412, 413 (10th Cir. 1982), the Court of Appeals held that "Taken as a whole, we believe the evidence in this case supports the trial judge's findings." In Montgomery, unlike Vaughn, the plaintiff apparently offered little or no evidence that would establish any pattern of behavior by the defendant and similarly failed to offer

any credible comparative or direct evidence. Thus there is no basis to compare the showings made in Montgomery and the showings made in Vaughn; as in Vaughn, both direct and circumstantial evidence were offered.[13/] Thus the primary similarity in the cases is the Court's view that the case must be evaluated on the record as a whole, evaluating all the relevant evidence.

Finally, in Perryman v. Johnson Products Co., Inc., 698 F.2d 11381 (11th Cir. 1983) the Court explicitly observes that the three-step test of McDonnell Douglas is appropriate in such cases and that direct as well as circumstantial evidence is relevant to the inquiry.

13/ It was, however, impossible to offer specific direct evidence regarding the effect of a specific number of burnt wires, since the defendant never established uniform production standards.

IV. THE DISTICT COURT PROPERLY CONSIDERED THE ORDER OF PROOF PRESENTED AS WELL AS THE WEIGHT TO BE ATTRIBUTED TO THAT PROOF

The defendant argues for a rule that would strictly determine the order as well as the type of proof that the Court may review in determining who prevails on the ultimate question in an individual Title VII case. Moreover, here, the defendant essentially challenges the weight the District Court assigned to various elements of proof presented and attempts to have those findings held clearly erroneous on that basis.

The thrust of the defendant's argument requires a reading of Burdine that is inconsistent with the plain meaning of the text. That is, nowhere does the Burdine Court hold that once the defendant articulates a "facially valid reasons[s]", Sweeny v. Board of

Trustees of Keena State College, 604 F.2d 106, 108 (1st Cir. 1979), no more is needed in order for the defendant to prevail. Such a position carelessly elevates the Court's "articulation" standard beyond its function of ordering the presentation of proof to insure that the issues are drawn and the evidence is presented in a manageable way to the trier of fact. Burdine, 67 L.Ed.2d at 216.

The defendant's formulation requires that once the defendant has made its articulation the Court may only consider evidence which directly challenges that articulation. While as indicated supra, much of plaintiff's evidence and the trial court's findings directly challenges the defendant's claims of incompetence on the part of plaintiff Vaughn, the language of Burdine nowhere suggests that all other evidence is irrelevant. Rather, since the defendant's showing is sufficient if its articulation raises a genuine issue

of fact as to whether the employer discriminated against the plaintiff, it follows that the presumptions, articulations and shifting of burdens are primarily concerned with sharpening the inquiry, that is, determining whether a question of fact exists, rather than limiting the scope of evidence the court may review or otherwise restricting its review of the record as a whole. Indeed, if in determining whether or not there has been intentional discrimination, the court may not look at the record as a whole, what meaning is then left to the Court's holding in McDonnell Douglas Corp., 411 U.S. at 802-804, that plaintiff must have the opportunity to prove her case "by a preponderance of the evidence."

Paradoxically, the defendant argues for this limitation on the Court's ability to review the whole record, in exactly the type

of situation in which the whole reocrd is most helpful, a case involving intentional discrimination in which there is a lack of objective standards by which to judge the plaintiff's performance. The defendant argues in effect that the trial court rules against it because of the absence of objective criteria. This was not the Court's holding. Rather it was the opposing evidence concerning plaintiff's production, coupled with the absence of objection production criteria, and the plaintiff's other evidence regarding the defendant's "general policy and practice with respect to minority employment,"[14/] all taken together, which led to the Court's holding in this case.

Repeatedly, the defendant mistates the effect of its lack of objective criteria,

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14/ McDonnell Douglas Corp. v. Green, 411 U.S. at 804.

and its failure to communicate a standard of production to plaintiff. Such practices, which necessarily introduce subjectivity into the decision making process, must be carefully scrutinized, particularly where, as here, the supervising staff is largely white, blacks are disproportionately concentrated in lower level jobs, and blacks are disproportionately discharged. Moreover, as this Court and others have held in several contexts, subjectivity at the point of selection can easily mask discrimination, and calls for particular scrutiny by the courts.[15/]

15/ Turner v. Fouche, 396 U.S. 346, 360 (1970); see also Davis v. Califano, 613 F.2d 957, 965-66 (D.C. Cir. 1980); Mistretta v. Sandra Corp., 649 F.2d 1383 (10th Cir. 1981); Nanty v. Borrows Co., 660 F.2d 1327, 1332 n.5 (9th Cir. 1981); and Robbins v. White-Wilson Medical Center, Inc., 642 F.2d 153, 156 (5th Cir. 1981).

In the case at bar, the trial court carefully considered the record as a whole and determined that the plaintiff had established her case by a preponderance of the evidence. The trial court's factual findings reviewed and upheld by the Court of Appeals on two occassions, make plain that notwithstanding the defendant's articulation of facially valid reasons for its disputed conduct, weighed against the record as a whole, there was sufficient basis for the Court's holding that the plaintiff was disqualified in violation of Title VII.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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